United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1026

United States Court of Appeals

For the Second Circuit

JOSEPH DE LORRAINE,

Plaintiff-Appellant,

—against—

MILLS PENSION TRUST, Representing the National Marine Engineers' Beneficial Association, and MILDRED E. HILLSDREE, Individually and in her capacity as Administrator of the MEBA Pension Trust,

Defendants-Appellees.

On Appeal from a Judgment of the United States District Court for the Southern District of New York

---

BRIEF FOR DEFENDANTS-APPELLEES

PROSKAUER ROSE GOETZ & MENDELSOHN
Attorneys for Defendants-Appellees
300 Park Avenue
New York, New York 10022
593-9000

Of Counsel
Morton M. Maranus
Bonnie J. Jones

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- x

JOSEPH DE LORRAINE, :

Plaintiff-Appellant, :

-against- :

MEBA PENSION TRUST, Representing the National Maine Engineers' Beneficial Association, and :

MILDRED E. KILLOUGH, Individually and in her capacity as Administrator of the MEBA Pension Trust, :

Defendants-Appellees. :

- x

Civil Action No. 74-1096

A F F I D A V I T

OF SERVICE BY MAIL

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

LAURA VILLAFANE, being duly sworn, deposes and says that she served a true copy of the attached Motion for Leave to File Amicus Curiae Brief and three copies of the attached Amicus Curiae Brief upon Proskauer, Rose, Goetz & Mendelsohn, by Mr. Robert Jossen, the attorneys of record for the defendants in said cause, on April 11, 1974, by mailing copies to them at 300 Park Avenue, New York, New York 10022, the last known address of the attorneys for the defendants.

Laura Villafane
LAURA VILLAFANE

Sworn to before me this
11th day of April, 1974.

Jonathan A. Weiss
NOTARY PUBLIC

JONATHAN A. WEISS
Notary Public, State of New York
No. 31-4207275
Qualified in New York County
Commission Expires March 30, 19[illegible]

INDEX

PAGE

Counterstatement of Issues. 2

Statement of the Case 3

The Facts 6

ARGUMENT

Point I

Section 302 does not supply a jurisdictional basis for allegations of breach of fiduciary duties. 14

Point II

The District Court properly granted defendants' motion for summary judgment on the Age Discrimination in Employment Act Claims 29

A. A pension trust is neither an employer, nor a labor organization or an agent thereof, for the purposes of the Age Discrimination in Employment Act. 29

B. Even if the Pension Trust were a labor organization for the purposes of the Act, it would be exempt under Section 623(f)(2). 34

C. The statute of limitations in the Act bars plaintiff from bringing this action. . 36

CONCLUSION. 39

Addendum - Section 302 of the Taft-Hartley Act, 29 U.S.C. §186

TABLE OF AUTHORITIES

PAGE

Cases:

Arroyo v. United States, 359 U.S. 419 (1959). . . . 16, 28

Barbot v. Frackman, 191 F. Supp. 171 (S.D. N.Y. 1961). 25

Bowers v. Ulpiano Casal, Inc., 393 F.2d 421 (1st Cir. 1968) 14, 19, 22, 25

In Re: Bricklayers Local No. 1 of Pa. Welfare Fund, 159 F. Supp. 37 (E.D. Pa. 1958). 25

Copra v. Suro, 236 F.2d 107 (1st Cir. 1958) 25

Danti v. Lewis, 312 F.2d 345 (D.C. Cir. 1962) . . . 22

Donnelly v. Guien, 467 F.2d 290 (2d Cir. 1972). . . 34

Employing Plasterer's Ass'n. v. Journeymen, 279 F.2d 92 (7th Cir. 1960) 19

Fiorelli v. Kelemer, 339 F. Supp. 796, aff'd without opinion, 474 F.2d 1340 (3d Cir. 1973) 19, 25

Gebhard v. GAF Corp., 5 FEP Cases 1043 (D.D.C. 1973) 38

Giordani v. Hoffman, 295 F. Supp. 463 (E.D. Pa. 1969) 25, 27

Goodman v. City Products Corporation, 425 F.2d 702 (6th Cir. 1970). 38

Grossfield v. Saunders Co., 1 FEP Cases 624 (S.D. N.Y. 1968). 35, 38

Hodgson v. American Hardware Mutual Insurance Company, 329 F. Supp. 225 (D.Minn. 1971). 35

PAGE

Holton v. McFarland, 215 F. Supp. 372 (D.C. Alaska, 1963). 25

Kavanagh v. Noble, 332 U.S. 535 (1947) 38

Kennet v. United Mine Workers of America, 183 F. Supp. 315 (D.D.C. 1969). 22

Kosty v. Lewis, 319 F.2d 744 (D.C. Cir. 1963) cert. denied, 375 U.S. 964 (1964) 22

Lee v. Nesbitt, 453 F.2d 1309 (9th Cir. 1971). 22

Lewis v. Benedict Coal Corp., 361 U.S. 459 (1960) 32

Local No. 2 v. Paramount Plastering Inc., 310 F.2d 179 (9th Cir. 1962) cert. denied, 372 U.S. 944 (1963). 33

Lugo v. Employees Retirement Fund, 366 F. Supp. 99 (E.D. N.Y. 1973) 23, 24, 27

Moses v. Ammond, 162 F. Supp. 866 (S.D. N.Y. 1958) 19, 20, 21, 22

Moyer v. Kirkpatrick, 265 F. Supp. 348 (E.D. Pa. 1967), aff'd, 387 F.2d 955 (3d Cir. 1968) 25

Porter v. Teamsters Health, Welfare and Life Insurance Funds, 321 F. Supp. 101 (E.D. Pa. 1970). 27

Raymond v. Hoffman, 284 F. Supp. 596 (E.D. Pa. 1966). 25

Roark v. Lewis, 401 F.2d 425 (D.C. Cir. 1968) 22

Sanders v. Birthright, 172 F. Supp. 895 (S. D. Ind. 1959). 19

Snider v. All State Administrators, Inc., 481 F.2d 387 (5th Cir. 1973) 19, 21

Sturgill v. Lewis, 372 F.2d 400 (D.C. Cir. 1966) 22

PAGE

United Marine Division v. Essex Transportation Co., 216 F.2d 410 (3rd Cir. 1954). 32

United States v. Embassy Restaurant, Inc., 359 U.S. 29 (1959). 32-33

United States v. Ryan, 350 U.S. 299 (1956). 17, 28

Upholsterer's Int'l Union of North America v. Leathercraft, 82 F. Supp 570 (E.D. Pa. 1949) 25

Walker Manufacturing Co. v. Industrial Commission, 27 Wis. 2d 669, 135 N.W. 2d 307, 1 EPD ¶9709 (1965) 36

Rule:

Fed. R. Civ. P. 12(b)(6). 13

Statutes:

29 U.S.C. §186(c) . . . . . passim

29 U.S.C. §301. 25

29 U.S.C. §623(a) 29-30

29 U.S.C. §623(c) 29-30

29 U.S.C. §623(f)(2). 34-35

29 U.S.C. §626(d) 37

29 U.S.C. §630(d) 31

Age Discrimination in Employment Act of 1967:

§4(a) 29-30

§4(c) 29-30

§4(f)(2). 34-35

§7(d) 37

§11(d). 31

PAGE

Labor Management Relations Act
of 1947, as amended (Taft-Hartley Act):

§302(c) . . . . . passim

Other Authorities:

H.R.s 9469, 9464, 9458, 7747, 976, 406,
93rd Cong., 1st Sess. (1973) 28

93 Cong. Rec. 4753 (1947) 17-18

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 74-1096

JOSEPH DE LORRAINE
Plaintiff-Appellant

-against-

MEBA PENSION TRUST, Representing the National Marine Engineers' Beneficial Association, and MILDRED E. KILLOUGH, Individually and in her capacity as Administrator of the MEBA Pension Trust
Defendants-Appellees

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES

COUNTERSTATEMENT OF ISSUES

1. Does a federal district court have jurisdiction, under Section 302(c)(5) of the Labor Management Relations Act, over a claim that the trustees of a jointly administered employer-union pension plan have violated their fiduciary duties in the administration of the plan?

The court below answered this question in the negative.

2. Does the requirement of Section 302(c)(5) that a jointly administered pension trust be for the "sole and exclusive benefit of the employees" reach allegations that trustees, acting pursuant to a pension trust which complies with all structural requirements of Section 302(c)(5), have taken actions motivated by improper considerations?

The court below answered this question in the negative.

3. Is a pension trust a "labor organization" as that term is used in the Age Discrimination in Employment

Act and thus subject to its prohibitions?

The court below answered this question in the negative.

4. If so, is the exemption for "bona fide . . . pension . . . plans" in the Age Discrimination in Employment Act applicable to this pension trust?

The court below answered this question in the affirmative.

5. Does the statute of limitations contained in the Age Discrimination in Employment Act bar the instant action?

The court below did not reach this issue.

Statement of the Case

On this appeal plaintiff-appellant seeks reversal of two orders of the District Court (Tyler, J.), which (i) granted defendant-appellees' motion for summary judgment, (A-71)* and (ii) after vacating the entry of judgment (A-72) and permitting plaintiff to amend his complaint

---

* References to the Joint Appendix are cited "A"

to assert a new cause of action (A-89), granted defendants' motion to dismiss the amended complaint. (A-113).

The principal question raised on this appeal is the appropriate scope of federal subject matter jurisdiction under Section 302 of the Labor Management Relations Act of 1947, 29 U.S.C. §186.*

Plaintiff contends that his allegations that the trustees of defendant pension trust acted arbitrarily and with improper motives in denying him permission to return to employment after his retirement states a cause of action under Section 302. The District Court determined that Section 302 was not intended to confer a broad jurisdiction upon the federal courts to consider allegations of "misadministration" of a pension trust which complies with the specific requirements of that section and that to conclude otherwise would require the development of a body of federal substantive law on the fiduciary duties of the trustees of pension trusts. The conclusion of the Court below is completely consistent with both the underlying intent and purpose of Section 302 as well as prior

---

* The full text of Section 302 is set forth in an addendum to this brief.

case law.

In enacting Section 302 Congress did not intend to charge federal courts with the responsibility of overseeing the day-to-day administration of pension trusts. Rather, the protection afforded by Section 302 was to require that pension funds be held in trust so that employees could seek redress in state courts for any alleged breach of common law fiduciary duties. A contrary result would lead to an inappropriate expansion of federal subject matter jurisdiction and would add substantial burdens to the already over-taxed jurisdiction of the federal courts.

Also presented for review on this appeal is the correctness of the District Court's dismissal of plaintiff's claim under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 et. seq. (1967). The District Court correctly determined that a pension trust is not, as plaintiff contends, a "labor organization" within the meaning of that Act and thus is not subject to the Act's proscriptions. A pension trust is not a collective bargaining representative of its beneficiaries.

In addition, the Court held that even if the trust were a "labor organization", it would be exempt from the

Act's prohibitions as a "bona fide . . . pension . . . plan."

Finally, although the District Court did not reach this issue, plaintiff's age discrimination claim must fail because of the absolute bar of the statute of limitations.

The Facts

In May, 1964 plaintiff, then 46 years old, had accumulated the twenty years of service as a marine engineer required for a pension (A-6). He notified the defendant Pension Trust that he had voluntarily decided to retire from seagoing employment in the maritime industry. At that time Mr. De Lorraine executed a declaration of retirement which stated as follows:

> "I, Joseph De Lorraine, hereby certify that I have withdrawn and shall remain completely withdrawn during my retirement from any employment aboard any vessel documented under the laws of the United States or aboard any vessel covered by any collective bargaining agreement with the Association and any

employment in the Association Locals or Plans."

* * *

"A return to employment as noted above, without written permission from the Trustees, shall be penalized in accordance with MEBA Pension Trust Regulations." (A-48)

The Pension Trust Regulations

Since the inception of the MEBA Pension Trust in 1955, its regulations have provided that to be eligible for a pension "an Employee must withdraw completely from any further employment" in seagoing occupations in the maritime industry. Under these regulations a pensioner can return to employment without jeopardizing the enjoyment of pension benefits only if he obtains the consent of the trustees. (A-25, A-44-46). A pensioner who returns to covered employment without such consent must return to the fund pension payments previously received. Further, he is not entitled to pension benefits for the months in which he works as well as for a period of six months thereafter. In the discretion of the trustees such a pensioner also may be permanently disqualified from further benefits. (A-45-46).

These provisions were designed to prevent a pension--which is available after 20 years of service, regardless of age--from being used as unemployment insurance or supplemental income. (A-23-24).

In fact, the Pension Trust's regulations were designed to guard against the very type of conduct in which plaintiff seeks to engage. If a pensioner could return to active employment whenever there was work available, or whenever he chose to return to work, and then return to pension status when work was unavailable, or when he decided to work ashore or not to work at all, a large number of eligible employees with 20 years of service would undoubtedly elect to receive pension benefits without actually intending to retire. In such event, the amount of funds in the Pension Trust available to pay pensions to employees who do retire and who do not seek to use the pension as a form of supplemental income or unemployment compensation would be substantially diminished. (A-24). Thus, the Pension Trust's regulations protect bona fide retirees and prevent a vast increase in pension costs.

Plaintiff's Return to Employment

Despite their long-standing regulations, the trustees, in response to the shipping emergency created by the war in Viet Nam, adopted the practice of granting consent to any marine engineer who was willing to aid the war effort by returning from retirement. Mr. De Lorraine applied for and received permission of the trustees to return to employment in February, 1968. (A-25-26).

As the Viet Nam War drew to a close in December, 1970 and the emergency need for marine engineers subsided, the trustees passed a resolution which withdrew the permission for all pensioners who had previously been permitted to return to covered employment. (A-49). In accordance with this resolution plaintiff was duly notified, by letter dated January 15, 1971 that his permission to return to covered employment would be terminated as of April 1, 1971. (A-50).

Plaintiff's Contentions

Plaintiff's contention is that the trustees' action in 1970 was improper because it was:

> "motivated by the desire of the union to minimize the number of older workers in

> favor of younger workers who would not be as concerned with retirement benefits (A-85) and who would benefit the union by paying school costs and initiation fees (A-8). . . ." (Brief of Plaintiff-Appellant, p. 3)

Furthermore, plaintiff complains that the 1970 Pension Trust resolution violated an alleged "swinging door" policy which permitted plaintiff to return to covered employment without jeopardizing his pension benefits (A-6-7).

The factual issues raised by these allegations are irrelevant here because the District Court did not reach their merits in deciding that the federal statutes invoked by plaintiff were not applicable. But it is difficult to understand how the union would benefit because pensioners no longer can work in the industry or why pensioners whose retirement benefits are fixed and assured would be more concerned with them than younger workers. Plaintiff also does not explain how the union would stand to gain if the training school, which is funded entirely by employer contributions to a separate trust, has more students.

Plaintiff's claim of a "swinging door policy" is belied by the fact that the Pension Trust's regulations have always required that a pensioner "withdraw completely from any furtner employment in the industry," and that

at the time of his retirement plaintiff certified that he had "withdrawn and shall remain completely withdrawn during my retirement from employment aboard any vessel . . .," and that he understood that "a return to employment" without consent would be "penalized in accordance with MEBA Pension Trust Regulations." (A-48).

Plaintiff did not seek an exception from the Pension Trust's regulations for hardship reasons. What he seeks--and has sought all along--is to use his pension benefits as a form of "unemployment compensation" or "supplemental income," the type of abuse of pension rights which the Pension Trust's regulations sought to prevent in order to protect the continued pension benefits of bona fide retirees.

The State Proceedings

Plaintiff filed a complaint against defendants with the New York State Division of Human Rights in April, 1971, in which he alleged that the action of the trustees, in revoking the permission to return to covered employment, discriminated against him on the basis of age and thus violated the Human Rights Law of New York State. The State Division found no "probable cause" and dismissed the complaint. (A-28-29). The State Human Rights Appeal Board,

finding "not an iota of evidence in the whole record" to suggest any discriminatory conduct (A-38), affirmed the dismissal of the complaint on December 20, 1971. (A-34-40). Although judicial review of these decisions was available, it was not pursued.

The Proceedings in the District Court

Plaintiff commenced this action in federal court in October, 1972, alleging violations of the Age Discrimination in Employment Act of 1967 only.

On February 21, 1973 Judge Tyler granted defendants' motion for summary judgment and dismissed the complaint.* Following the entry of judgment plaintiff moved to vacate the judgment and for permission to file an amended complaint. In an opinion dated June 5, 1973, Judge Tyler granted this relief and permitted plaintiff to file his amended complaint. (A-86-89).

In his amended complaint, which was not based on any additional facts, plaintiff alleged for the first time that the 1970 resolution, rescinding permission to

---

* The first decision of the District Court is reported at 355 F. Supp. 89 (S.D.N.Y. 1973). Subsequent references are to the opinion as reproduced in the Appendix.

return to covered employment, constituted a breach of the Pension Trust's "fiduciary duties to the plaintiff according to the traditional common law of trusts,"* (A-98) and violated Section 302(c)(5) of the Labor Management Relations Act (A-97).

Defendants moved thereafter, pursuant to Fed. R. Civ. P. 12(b)(6), to dismiss the amended complaint for failure to state a claim upon which relief can be granted. In an opinion dated November 20, 1973, the Court below held that Section 302 did not extend to the allegations in plaintiff's amended complaint, and granted defendants' motion to dismiss the amended complaint. This appeal followed.

---

* Plaintiff's claims of violations of common law fiduciary duties and promissory estoppel were premised on pendent jurisdiction. Since the court found no jurisdiction over the federal claims, there was no occasion to consider the state claims. On this appeal there is no issue raised with regard to pendent jurisdiction.

ARGUMENT

POINT I

SECTION 302 DOES NOT SUPPLY A JURISDICTIONAL BASIS FOR ALLEGATIONS OF BREACH OF FIDUCIARY DUTIES

It is the plaintiff's contention that his allegations that the trustees acted arbitrarily and contrary to the best interests of the beneficiaries in denying pensioners permission to return to employment in the maritime industry state a cause of action under Section 302(c)(5) of the Taft-Hartley Act and that the federal courts thus have jurisdiction to determine such claims.

Although the subject of earlier considerable debate, it is now well settled that Section 302 of the Taft-Hartley Act, 29 U.S.C. §186, does not grant the federal courts jurisdiction to inquire into mere "violations of fiduciary obligations or standards of prudence in the administration of a trust fund." Bowers v. Ulpiano Casal, Inc., 393 F. 2d 421, 424 (1st Cir. 1968) (Footnote omitted). Nor does it authorize them to develop a federal common law regulating the administration of jointly administered labor-management pension trusts or

the fiduciary responsibilities of their trustees.

Section 302 is a penal statute which makes it a crime for employers, with certain specific exceptions, to make payments to unions, or more generally, to the representatives of employees.

Subsection (c) of Section 302 then creates seven exceptions to the prohibitions of subsections (a) and (b). Subsection (c) (5) permits the payment of monies by an employer "to a trust fund" provided that it complies with the specific statutory requirements enumerated therein. These requirements are as follows:

1. The trust fund must be established for the sole and exclusive benefit of employees and dependents.

2. Payments must be held in trust to pay for the medical care, pensions, etc. of the employees.

3. The detailed basis of payments must be set forth in writing.

4. Employers and employees must have equal representation in administration of the trust.

5. The plan must contain provisions for an annual audit.

6. There must be separate trusts for pension and annuity funds.

The District Courts are granted jurisdiction to "restrain violations" of Section 302 in subsection (e).

Eschewing this narrow statutory grant of jurisdiction, plaintiff asserts that Section 302(e) reaches his claims of wrongdoing by the trustees, in their withdrawal of permission to return to covered employment, by virtue of the conclusory allegation that the Pension Trust is not being administered for the "sole and exclusive benefit" of the employee-beneficiaries.

Section 302 does not create, or authorize the federal courts to establish, federal standards of fiduciary conduct. It simply requires that pension funds be established in trust form, leaving to pre-existing state law and to state courts the delineation of the fiduciary responsibilities of the trustees.

Although the legislative history of Section 302 is sparse, it supports this construction. As the Supreme Court emphasized in Arroyo v. United States, 359 U.S. 419 (1959), Section 302 was passed to prevent "corruption of

collective bargaining through bribery of employee representatives by employers, [and] . . . extortion by employee representatives . . .." (359 U.S. at 425-26). Indeed, in its earlier decision in United States v. Ryan, 350 U.S. 249 (1956) the Court recognized that pension funds were not the foremost targets of the legislation:

> "The arrangement of §302 is such that the only reference to welfare funds is contained in §302(c)(5). If Congress intended to deal with that problem alone, it could have done so directly, without writing a broad prohibition in subsections (a) and (b) and five specific exceptions thereto in subsection (c), only the last of which covers welfare funds." (350 U.S. at 302)

The view that Section 302 was not intended to require the development of federal law on matters of trust administration and fiduciary responsibilities is further supported in the Senate debates on the legislation. Thus, at a critical juncture before the passage of the amendment which added Section 302 to the Labor Management Relations Act, the following exchange occurred between Senators Ferguson, Ball and Taft:

> "Mr. FERGUSON. I simply wanted to inquire whether all these funds [referring to pension funds then in existence] were not trust funds, and if so, does not the court of chancery of the State have full

jurisdiction to do practically what the amendment proposes to do?

"Mr. BALL. No; they are not trust funds. They are not set up in the agreements as trust funds.

* * *

"Mr. TAFT. The answer is that the amendment requires that there be specified in the agreement the exact terms under which benefits are to be received. The complete terms with respect to benefits must be set out in the agreement. If it is only a trust fund for welfare purposes, with no specific terms or regulations, a court of chancery cannot write a welfare fund system into it. The court has no power to do that. No single employee can bring suit under such a general fund provision and prove that he personally has any rights whatever in the fund."
93 Cong. Rec. 4753 (1947).

Senator Taft's remarks indicate that with the requirement of a carefully structured trust form, Section 302 would enable the state courts to guard against abuses in the administration of such pension funds.

Plaintiff, however, seeks to graft on to the otherwise precise statutory scheme of Section 302 federal judicial power to oversee the day to day administration of pension trusts. Such a position is simply inconsistent with the fact that "when the Congress wants to establish the basis for comprehensive jurisdiction, it knows how to

do so." Bowers v. Ulpiano Casal, Inc., supra, 393 F.2d at 425 (footnote omitted).

Mindful of the specific purpose behind Section 302 and wary of a construction which would lead to a substantial role of the federal district courts in the management of jointly administered pension trusts, the majority of judicial decisions have followed the view that Section 302 is limited to allegations of specific violations of the structural requirements enumerated therein. See, e.g., Snider v. All State Administrators, Inc., 481 F.2d 387 (5th Cir. 1973); Bowers v. Ulpiano Casal, Inc., supra; Fiorelli v. Kelewer, 339 F. Supp. 796, aff'd. without opinion, 474 F.2d 1340 (3d Cir. 1973); Sanders v. Birthright, 172 F. Supp. 895 (S.D. Ind. 1959); Moses v. Ammond, 162 F. Supp. 866 (S.D.N.Y. 1958). Cf, Employing Plasterer's Ass'n v. Journeymen, 279 F.2d 92, 97 (7th Cir. 1960).

Thus, for example, in Bowers v. Ulpiano Casal, Inc., supra, the First Circuit explained the appropriate scope of federal court jurisdiction under Section 302:

> "We are, however, persuaded that the weight of reason and authority compels a narrow reading of section 302(e). In the

> first place, its language limits federal courts 'to restrain violations of this section'. These violations, if we read correctly, are violations of basic structure, as determined by the Congress, not violations of fiduciary obligations or standards of prudence in the administration of the trust fund." 393 F. 2d at 424 (footnote omitted).

In rejecting the view that Section 302(e) constituted a broad grant of jurisdiction, the Court noted that it was joining

> "the current majority position that Section 302(e) is not the foundation stone for federal court management of trust funds." 393 F.2d at 426.

The Court in Moses v. Ammond, 162 F. Supp. 866 (S.D.N.Y. 1958), reached a similar conclusion as to the narrow scope of federal jurisdiction under Section 302 by contrasting it with Section 301:

> "This conclusion is buttressed by a comparison of the language of this subsection with the language Congress employed in Section 301(a) of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C.A. §185(a). That subsection provides jurisdiction in the federal courts for '[s]uits for violation of [labor-management] contracts'. Interpreting that broad language, the Supreme Court has held that Congress had power to regulate labor-management controversies, that §185(a) directed the federal courts to fashion federal law to regulate those controversies, and that jurisdiction to decide these controversies was present

> because they would 'arise under' the federal law which the federal courts were to fashion. Textile Workers Union of America v. Lincoln Mills of Alabama, ... I find, from the language of §186(e), no Congressional mandate to the federal courts to fashion federal law for the administration of union welfare trusts."

The Court held that:

> "29 U.S.C.A. §186(e) [Section 302] does not direct the federal courts to fashion a federal law for the administration of union welfare funds . . .."
> 162 F. Supp. at 870-871 (emphasis added).

A lucid explanation of the reason for the limited scope of jurisdiction under Section 302 appears in the most recent decision to uphold the narrow construction of Section 302:

> "Trust funds for the benefit of union members are established under the laws of the respective states. Federal law affects union trust funds only to the extent that Congress has elected to exempt employer contributions to such funds made under the terms of a labor-management contract from the general prohibition on employer payments to employee organizations. While Congress thought it necessary in order to prevent potential abuse of this exemption to stipulate the conditions under which payments can be legally made, State authority remains the legal foundation upon which such funds are constructed." Snider v. All State Administrators, Inc., supra, 481 F. 2d 387, 390 (5th Cir. 1973).

Undaunted by the stream of judicial authority to the contrary, plaintiff seeks to rely upon a line of cases decided in the District of Columbia Circuit and a recent decision in the Eastern District of New York to support the expansive federal jurisdiction asserted on this appeal.

The District of Columbia cases relied on by plaintiff are not in point on the issue of jurisdiction under Section 302. None of these decisions considered the jurisdictional problems which face plaintiff here, probably because they were decided, as the District Court observed, under the peculiar equity jurisdiction which the District of Columbia courts enjoyed in their dual capacity as courts of local as well as federal jurisdiction. Cf. Kennet v. United Mine Workers of America, 183 F. Supp. 315 (DDC 1969).*

---

* The cases plaintiff cites appear to have developed an "arbitrary and capricious" standard against which to measure the actions of trustees. These cases suggest that this standard arises from principles of common law and not from the federal statute which concerns us here. As noted above, none of these decisions even attempt to deal with the problem of federal jurisdiction. Compare, Roark v. Lewis, 401 F.2d 425 (D.C. Cir. 1968); Sturgill v. Lewis, 372 F. 2d 400 (D.C. Cir. 1966); Kosty v. Lewis, 319 F.2d 744 (D.C. Cir. 1963) cert. denied 375 U.S. 964 (1964); Danti v. Lewis, 312 F.2d 345 (D.C. Cir. 1962) with Bowers v. Ulpiano Casals, Inc., supra; Fiorelli v. Kelewer, supra; Moses v. Ammond, supra.

Nor is the decision in Lee v. Nesbitt, 453 F.2d 1309 (9th Cir. 1971) to the contrary. In Lee, an action founded on diversity jurisdiction, the Court adjudged a break-in-service eligibility requirement by a standard of "arbitrary and capricious." It is clear that this standard, which the Court exacted from the decisions in the District of Columbia, was applied by the Court sitting in its role as a state tribunal in a diversity case.

Plaintiff also attributes significant weight to the decision in Lugo v. Employees Retirement Fund, 366 F. Supp. 99 (E.D.N.Y. 1973). In Lugo, the District Court assumed jurisdiction under Section 302 over the claim that the pension trust's regulations for determining eligibility were arbitrary and capricious. After noting the narrow construction accorded to Section 302, the Court observed:

> "A Plaintiff who places in issue the exclusionary eligibility requirements of a trust fund places in issue the question whether the fund is a Section 302 fund." 366 F. Supp. at 102.

The Court then concluded that by the mere allegation that the trust fund was not for "the sole and exclusive benefit of the employees," jurisdiction was conferred on the Court. 366 F. Supp. at 102.

As to the claims that the trustees' procedures deprived plaintiff of due process rights, however, the Court expressed its doubt whether such an allegation was sufficient under Section 302. Uncertain "whether the Second Circuit will interpret the jurisdiction of this Court under Section 302 as broadly as the District of Columbia Court of Appeals," the Court rested its decision

on the conclusion that where "a trust fund . . . authorizes the trustees to act abritrarily and capriciously" a defect in the structural requirements enumerated in Section 302 is alleged which satisfies the jurisdictional requirements of Section 302. 366 F. Supp. at 103.

In the instant case, judge Tyler considered, but declined to follow, the Lugo decision because it rested solely on the authority of the District of Columbia cases discussed, supra.

Judge Tyler also recognized that Lugo presented a different problem than that herein, because if the trust agreement itself contained a defective provision which governed the action of the trustees no effective state court remedy would be available.

> "[T]he fact that a trust fund is improperly structured rather than misadministered may well have practical consequences. Only in the former case are the activities of the trustees to some extent sheltered by the provision of the contract entered into by the employer and the employees' representative. If a pension trust is established in accordance with the provision of §302(c)(5), a trustee who has breached his fiduciary duty will be unable to defend himself by alleging that his conduct was authorized by the terms of the agreement which created the trust. In state suits, this could well be an important factor." (A-111)

This, we submit, is the critical point about Section 302: Congress sought to remedy the abuse of union control over employer-contributed funds by imposing a requirement that such contributions be made in trust form, thereby creating a remedy in state courts, under established common law principles of fiduciary responsibility, to protect against wrongdoing by trustees. Consistent with this view, it is only when the pension plan itself deviates from the carefully imposed trust superstructure--and thus affects the ability of employees to seek review of the trustees' actions in state courts--that the federal jurisdiction is called into operation.*

---

* The cases cited by plaintiff as contrary to this principle are no longer valid. Copra v. Suro, 236 F.2d 107 (1st Cir. 1958), cited in plaintiff's brief (p. 11) was expressly not followed by a later case in that same court. Bowers v. Ulpiano Casal, Inc., 393 F.2d 421 (1st Cir. 1968). Furthermore, several cases cited by plaintiff from the Eastern District of Pennsylvania (In Re: Bricklayers Local No. 1 of Pa. Welfare Fund, 159 F. Supp. 37 (E.D. Pa. 1958); Raymond v. Hoffman, 284 F. Supp. 596 (E.D. Pa. 1966) and Upholsterer's Int'l. Union of North America v. Leathercraft Furniture Co., 82 F. Supp. 570 (E.D. Pa. 1949) have in effect been overruled by later cases in that same district (Moyer v. Kirkpatrick, 265 F. Supp. 348 (E.D. Pa. 1967) aff'd. 387 F.2d 955 (3d Cir. 1968); Giordani v. Hoffman, 295 F. Supp. 463 (E.D. Pa. 1969); and Fiorelli v. Kelemer, 339 F. Supp. 796 (E.D. Pa. 1972), although not by name. Finally, Barbot v. Frackman, 191 F. Supp. 171 (S.D. N.Y. 1961), also cited by plaintiff, concerned a pension trust that violated the basic structural requirements of §302(c)(5), not merely general fiduciary obligations. It did not have equal representation between management and labor and did not file annual reports, as required by the Welfare and Pension Plan Disclosure Act of 1959, 29 U.S.C. §§ 301-309. That case was explained in Holton v. McFarland, 215 F. Supp. 372 (D.C. Alaska, 1963).

Plaintiff does not claim that the Pension Trust was not properly established as a trust, or that the Pension Trust has not complied with all the structural requirements in Section 302(c)(5). Plaintiff's sole complaint is that the action of the trustees in rescinding the permission to work granted to all pensioners during the Viet Nam emergency was contrary to the best interests of the beneficiaries and motivated by a desire to favor the conflicting interests of the union. This, plaintiff contends, means that the Pension Trust now no longer exists for the "sole and exclusive benefit of the employees" as required by Section 302(c)(5).

Plaintiff claims that the "sole and exclusive benefit" requirement is, in effect, a catch-all which makes any claim for relief based on the actions of trustees cognizable under Section 302(c)(5) and thus a matter of federal jurisdiction. Under such a construction of this requirement, any alleged breach of fiduciary obligation would violate it and become a matter of federal law and federal jurisdiction. The exception that federal jurisdiction exists only to remedy violations of the specific requirements of Section 302(c)(5) would then swallow up the general rule that Section 302 does not create a broad

basis of federal jurisdiction and does not authorize the creation of federal law to regulate the day-to-day administration of pension trusts. In effect, then the "sole and exclusive benefit" phrase would be used as

> "a shibboleth for gaining access to federal courts by plaintiffs whose paramount concern is with matters of trust administration best left to state courts." Giordani v. Hoffman, 295 F.Supp. 463, 471-72 (E.D. Pa. 1969).*

The "sole and exclusive benefit" requirement of Section 302 (c) (5) means that no one other than employees of the contributing employer and their dependents can participate as beneficiaries in the trust fund. Thus, for example, the statutory requirement guards against the inclusion of individuals who are not employees of contributing employers on the pension fund's rolls as a subterfuge for illicit payments by employers to union officials barred by Section 302(a) and (b). This construction of the "sole and exclusive benefit" requirement reinforces the purpose of Section 302(a),

---

* Decisions like Lugo, supra, and Porter v. Teamsters Health, Welfare and Life Insurance Funds, 321 F. Supp. 101 (E.D. Pa. 1979), upon which plaintiff relies, demonstrate this point. While these cases pretend to follow the "structural defects" test, they effectively emasculate the rule by giving a broad construction to the "sole and exclusive benefit" requirement of Section 302.

to prevent corruption and extortion in the collective bargaining process, without unnecessarily expanding its scope. See, e.g., Arroyo v. United States, supra, 359 U.S. at 425-26; United States v. Ryan, supra, 350 U.S. at 302.

Congress did not intend Section 302 to engender the development of a body of federal trust law or jurisdiction. The federal courts have therefore properly declined to burden their already overloaded federal jurisdiction by reviewing the actions of pension trustees where an effective remedy is provided in the state courts.*

---

* Naturally, if Congress so desires, pension trusts could be regulated by federal law. But such a development would require specific legislative enactment. Indeed, as Judge Tyler observed, there are current suggestions that Congress is contemplating such measures. See, e.g., H.R.s 9469, 9464, 9458, 7747, 976 and 406, 93rd Cong. 1st Sess. (1973).

POINT II

THE DISTRICT COURT PROPERLY GRANTED DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE AGE DISCRIMINATION IN EMPLOYMENT ACT CLAIMS

In the Court below Plaintiff's initial theory of the case was that the trustees' refusal to permit pensioners to return to work in covered employment amounted to a violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 et seq. We submit that the limitation of the Act's prohibitions to "employers" and "labor organizations" and its specific exclusion of "bona fide...pension... plans" precludes any claim that the trustees have violated it.

A. A pension trust is neither an employer, nor a labor organization or an agent thereof, for the purposes of the Age Discrimination in Employment Act.

The Age Discrimination in Employment Act makes unlawful certain discriminatory practices by employers and labor organizations. It is unlawful for an "employer"

> "(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter." 29 U.S.C. §623(a)

Similarly, the Act makes it unlawful for a "labor organization"

"(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section." 29 U.S.C. §623(c)

The Act does not apply to a pension trust unless it is an employer or a labor organization.*

Plaintiff appears to concede now that defendants are not "employers" under the Act. The thrust of plaintiff's claim is that the trustees must be deemed to be a "labor organization" or the agents of such an organization.

---

* The Act also applies to "employment agencies", but no contention has been made that the trustees come within this term.

Section 630(d) of the Act defines a "labor organization" as follows:

> "(d) The term 'labor organization' means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization."

The District Court considered the meaning of the critical phrase "dealing with employers" in the statutory definition and held that this phrase refers to the conduct of negotiations in a collective bargaining setting or some adversarial process (A-69). The Court's conclusion is consistent with the type of activities described in the statutory definition. Further, Judge Tyler's view gives recognition to the practical distinctions between the trustees of a pension fund and the employer and union which

establish the fund pursuant to a collective bargaining agreement.

The trustees' sole function is to administer a pension fund and establish regulations which determine eligibility for pensions. They do not deal with employers on grievances or other problems which arise under the collective bargaining agreement. They neither hire nor refer for employment or determine the terms and conditions of employment, and it was these functions alone which were regulated by the Act.

The trustees are not agents of a "labor organization", as plaintiff contends. Although the trustees are appointed by the employer and the union as required by Section 302(c)(5), in their capacity as trustees they are "not acting as representatives of either union or employers. They are trustees of a fund and have fiduciary duties in connection therewith as do other trustees." United Marine Division v. Essex Transportation Co., 216 F.2d 410, 412 (3rd Cir. 1954). Cf. Lewis v. Benedict Coal Corp., 361 U.S. 459, 468 (1960); United States v. Embassy

Restaurant, Inc., 359 U.S. 29, 32-34 (1959). As trustees they owe no allegiance to the union or to the employer, but are legally responsible and accountable to the beneficiaries of the fund for their actions.*

Finally, even if there was merit to plaintiff's agency argument, he failed to proffer any factual support for this contention. Instead, plaintiff buttressed his accusations with mere guesses and hypotheses.

Plaintiff could not oppose the motion for summary judgment by merely standing on his unsupported allegation that the trustees of the pension fund, consisting of an equal number of employer and union representatives, were acting as "agents" for the union. (A-23, ¶9) As the District Court recognized, on a motion for summary judgment the party opposing the motion

---

* Local No. 2 v. Paramount Plastering, Inc., 310 F. 2d 179 (9th Cir. 1962), cert. denied., 372 U.S. 944 (1963), which plaintiff cites to support his agency theory, is not helpful. In Local No. 2 the Court held that an employer-union corporation, set up to administer a pension trust, was a "representative of employees" for the purposes of Section 302 of the Taft-Hartley Act. That statute, of course, was enacted for a very different purpose and the peculiar applicability of the term in the former Act has no bearing on the specific definition of "labor organization" in the Age Discrimination Act.

cannot rely upon "the bald assertion that there is a dispute" without presenting evidence to substantiate its position. Donnelly v. Guien, 467 F. 2d 290, 293 (2d Cir. 1972). Plaintiff did not add anything to the bare assertions in his complaint and thus ignored his burden of proof.

In these circumstances, plaintiff failed to make any showing that the defendant Pension Trust was an organization subject to the restrictions contained in the Age Discrimination in Employment Act, and his claim thereunder was properly dismissed.

B. Even if the Pension Trust were a Labor Organization for the Purposes of the Act, it would be Exempt under Section 623(f)(2).

The Court below also rested its decision granting defendants' motion for summary judgment on the fact that even if the Pension Trust were considered to be a "labor organization", it would be exempt from the provisions of the Age Discrimination in Employment Act under Section 623 (f)(2).

Section 623(f)(2) provides as follows:

> "f. It shall not be unlawful for an employer, employment agency, or labor organization --
>
> * * *

> (2) to observe the terms of ... any bona fide employee benefit plan such as a retirement, pension or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual;"

This exemption reflects Congress' intent that retirement policies, even mandatory retirement requirements, not be the subject of regulation. Indeed, it is difficult to understand how an employee who retires voluntarily, as plaintiff here did, can complain that the retirement plan discriminates on the basis of age.

As the District Court found, this statutory exemption is absolute and, in order to have any meaning at all, must fully protect the actions of defendants here from any claim of discrimination. This conclusion follows the holdings of the few courts which have been called upon to interpret the statutory scheme. See, e.g., Hodgson v. American Hardware Mutual Insurance Company, 329 F. Supp. 225 (D. Minn. 1971); Grossfield v. Saunders Co., 1 FEP Cases 624 (S.D.N.Y. 1968).

The only limitation on Section 623(f)(2)'s exemption is the proviso that the benefit plan must not be a "subterfuge to evade the purposes of this chapter...".

No persuasive argument can be made that the Pension Trust here is a "subterfuge". It has been in existence since 1955 - prior to the enactment of the Act - and continues to pay substantial benefits to pensioners. Although no federal court has construed the term "subterfuge", it is reasonably clear that this term refers only to a plan which is a sham, or is defective in some critical respect. Thus, for example, the statutory proviso would probably reach a pension plan which failed to provide substantial benefits, or under which the continuation of benefit payments was in jeopardy. Cf. Walker Manufacturing Company v. Industrial Commission, 27 Wis. 2d 669, 135 N.W. 2d 307, 1 EPD ¶9709 (1965).

In brief, only a distortion of the specific statutory exemption from actions which are taken pursuant to the terms of a bona fide retirement plan would enable plaintiff's grievance to receive recognition under federal law.

C. The Statute of Limitations in the Act Bars Plaintiff from Bringing this Action.

Given its disposition of defendants' motion for summary judgment, the Court below did not reach defendants' further claim that the instant action was barred by the

self-contained statute of limitations in the Age Discrimination in Employment Act. Even if this Court disagrees with the analysis of the substantive provisions of the Act discussed above, it should nevertheless affirm the judgment below on this ground.

Section 626(d) of the Act provides:

> "No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed--
>
> * * *
>
> (2) ...within three hundred days after the alleged practice occurred or within thirty days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier."

Since plaintiff's cause of action arose on April 1, 1971, and the state proceedings were concluded on December 20, 1971, the statutory notice was due by January 19, 1972. However, plaintiff failed to notify the Secretary of Labor until July 19, 1972 - some six months later.

As the Supreme Court has said regarding time limitations like those in Section 626(d):

"Such periods are established to cut off rights, justifiable or not, that might otherwise be asserted and they must be strictly adhered to by the judiciary." Kavanagh v. Noble, 332 U.S. 535, 539 (1947).

Consistent with this principle, such time limitations have been strictly adhered to as jurisdictional in nature. See, e.g., Gebhard v. GAF Corp., 5 FEP Cases 1043 (D.D.C. 1973); Grossfield v. Saunders Co., supra*.

Plaintiff's failure to take timely action to pursue his claim under the Age Discrimination in Employment Act deprived the District Court of jurisdiction over this action and thus supplies an independent basis for affirmance of the decision below.

CONCLUSION

FOR THE FOREGOING REASONS, THE ORDERS AND JUDGMENT OF THE DISTRICT COURT DISMISSING THE COMPLAINT AND AMENDED COMPLAINT SHOULD BE AFFIRMED.

Respectfully submitted,

PROSKAUER ROSE GOETZ & MENDELSOHN
Attorneys for Defendants-Appellees

OF COUNSEL:
Morton M. Maneker
Robert J. Jossen

Dated: April 15, 1974.

---

* See also, Goodman v. City Products Corporation, 425 F.2d 702 (6th Cir. 1970), where the court held that a provision in the Civil Rights Act of 1964, Section 706(e), 42 U.S.C. Section 2000e-5(e), similar to Section 626(d), barred a discriminatory discharge suit which was commenced 31 days after receipt of notice from the administrative agency involved.

ADDENDUM

Section 302 of the Taft-Hartley Act, 29 U.S.C. §186:

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value -

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined

in Part II of the Interstate Commerce Act) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: PROVIDED, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: PROVIDED, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): PROVIDED, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees,

compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in the event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: PROVIDED, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institutions, or (B) child care centers for preschool and school age dependents of employees: PROVIDED, That no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall

not constitute an unfair labor practice: PROVIDED FURTHER, That the requirements of clause a (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; or (8) with respect to money or any other thing of value paid by anyemployer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice: PROVIDED, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds: PROVIDED FURTHER, That no such legal service shall be furnished: (A) to initiate any proceeding directed (i) against any such employer or its officers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers, or agents, or (iii) against any other employer or labor organization, or their officers or agents, in any matter arising under subchapter II of this chapter or this chapter; and (B) in any proceeding where a labor organization would be prohibited from defraying the costs of legal services by the provisions of the Labor-Management Reporting and Disclosure Act of 1959.

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of Title 28 (relating to notice to opposite party) to restrain violations of this section, without regard to the provisions of section 17 of Title 15 and section 52 of this title, and the provisions of sections 101-115 of this title.

(f) This section shall not apply to any contract in force on June 23, 1947, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) Compliance with the restrictions contained in subsection (c) (5) (B) of this section upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c) (5) (A) of this section be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits. June 23, 1947, c.120, Title III, §302, 61 Stat. 157; Sept. 14, 1959, Pub.L. 86-257, Title V, §505, 73 Stat. 537.

C 375—Affidavit of Personal Service of Papers on Individual.

JULIUS BLUMBERG, INC., LAW BLANK PUBLISHERS
80 EXCHANGE PLACE AT BROADWAY, NEW YORK

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOSEPH DE LORRAINE,

Plaintiff Appellant,

against

MEBA PENSION TRUST, Representing the National Marine Engineers' Beneficial Association, and MILDRED E. KILLOUGH, Individually and in her capacity as Administrator of the MEBA Pension Trust,

Defendant Appellees

Index No. 74-1096

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

SANDRA HILE *being duly sworn,*

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 15 Brompton Road, Garden City, New York

That on the 15th *day of* April *19* 74 *at* 11 a.m.

deponent served the annexed Brief for Defendants-Appellees *upon* E. Judson Jennings, Legal Services for the Elderly Poor, 2095 Broadway, New York, New York

the attorney for plaintiff/appellant *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* attorney for plaintiff/appellant *herein,*

Jeanette L. Dowd

Sworn to before me, this 15th *day of* April *19* 74

JEANETTE L. DOWD
NOTARY PUBLIC, State of New York
No. 41-4500384
Qualified in Queens County
Term Expires March 30, 1975

Sandra Hile

Print name beneath signature

SANDRA HILE